No. 91-1347

(2)

APR 24 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

SALVATORE R. CURIALE, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
WILLIAM KANTER
JENNIFER H. ZACKS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a state statute establishing the priority of creditors' claims in a proceeding to liquidate an insolvent insurance company is a law regulating "the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. 1012, such that the state statute is not preempted by the federal priority statute, 31 U.S.C. 3713(a).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	6

TABLE OF AUTHORITIES

Cases:

Casualty Co. of America, In re, 196 A.D. 175 (1st Dep't), aff'd, 232 N.Y. 559 (1921)	4
Clark v. *Williard*, 292 U.S. 112 (1934)	5
Gordon v. *United States Dep't of the Treasury*, 846 F.2d 272 (4th Cir.), cert. denied, 488 U.S. 954 (1988)	5
Idaho ex rel. Soward v. *United States*, 858 F.2d 445 (9th Cir. 1988), cert. denied, 490 U.S. 1065 (1989)	5
Langdeau v. *United States*, 363 S.W.2d 327 (Tex. Civ. App. 1962)	5
Union Indemnity, In re, 551 N.Y.S.2d 446 (Sup. Ct. 1990), aff'd *sub nom. Curiale* v. *United States*, 556 N.Y.S.2d 853 (App. Div. 1991)	5
United States v. *Key*, 397 U.S. 322 (1969)	3
United States v. *Knott*, 298 U.S. 544 (1936)	4
United States v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944)	3
United States v. *Vermont*, 377 U.S. 351 (1964)	3
United States Dep't of the Treasury v. *Fabe*, 939 F.2d 341 (6th Cir. 1991), petition for cert. pending, No. 91-1513	4, 6

Statutes and rules:

Federal Arbitration Act, 9 U.S.C. 1 *et seq.*	4
McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*	3
15 U.S.C. 1012	3
28 U.S.C. 1257	5
31 U.S.C. 3713	2
31 U.S.C. 3713(a)(1)(A)	2

Statutes and rules—Continued

Page

N.Y. Ins. Law §§ 7433-7434 (McKinney 1985 & Supp. 1992) 2

Sup. Ct. R.:

Rule 10.1(a) 6

Rule 10.1(b) 6

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1347

SALVATORE R. CURIALE, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The decision of the Appellate Division of the Supreme Court of New York (Pet. App. 1a-2a) is reported at 566 N.Y.S.2d 853. The opinion of the Supreme Court of New York (Pet. App. 3a-7a) is reported at 551 N.Y.S.2d 446.

JURISDICTION

The judgment of the Appellate Division was entered on February 21, 1991. On November 25, 1991, the Court of Appeals of New York denied petitioner's motion for leave to appeal. Pet. App. 8a. The petition for a writ of certiorari was filed on Monday, February 24, 1992. This Court's jurisdiction is invoked under 28 U.S.C. 1257(a).

STATEMENT

1. Petitioner Salvatore Curiale, New York's Superintendent of Insurance, is the liquidator of Union Indemnity Insurance Company of New York, an insolvent insurance company. The Internal Revenue Service (IRS) filed a claim against the insolvent insurer for $137,245.18 in taxes, interest, and penalties. The IRS asserted that its claim was entitled to first priority under the federal priority statute, 31 U.S.C. 3713.[1] Pet. App. 3a.

Petitioner brought suit in the New York Supreme Court challenging the IRS's claim of first priority. Petitioner contended that the priority of the IRS's claim is not governed by the federal priority statute, but rather by New York's statute establishing the priority of claims in insurance insolvency proceedings. Under the New York priority statute, the IRS's claim is treated as a general creditor claim that ranks behind administrative expenses, secured claims, and certain wage claims. See N.Y. Ins. Law. §§ 7433-7434 (McKinney 1985 & Supp. 1992). Petitioner argued that the federal priority statute does not preempt the state statute because the statute is a regulation of "the business of insurance" within the

---

[1] The federal priority statute provides, in part:

> (a) (1) A claim of the United States Government shall be paid first when—
>
> > (A) a person indebted to the Government is insolvent and—
> >
> > > (i) the debtor without enough property to pay all debts makes a voluntary assignment of property;
> > >
> > > (ii) property of the debtor, if absent, is attached; or
> > >
> > > (iii) an act of bankruptcy is committed * * *.

31 U.S.C. 3713(a)(1)(A).

meaning of the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*[2] Pet. App. 3a; Pet. 6-7.

2. The New York Supreme Court held that the claim of the United States is entitled to first priority. Pet. App. 3a-7a. The court noted that the federal priority statute "in more or less the same form has been in existence since the early days of the republic," and is "founded upon a policy of protecting the public revenues." Pet. App. 4a (citing *United States* v. *Key*, 397 U.S. 322 (1969)). The court also noted that a tax liability is a debt within the meaning of the federal priority statute. Pet. App. 4a (citing *United States* v. *Vermont*, 377 U.S. 351 (1964)).

The court concluded that it was not required to decide whether the New York statute establishing the priority of claims in a liquidation proceeding regulates "the business of insurance" within the meaning of the McCarran-Ferguson Act. Instead, the court concluded that the McCarran-Ferguson Act was intended to restore the States' authority to regulate insurers as it had existed prior to *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). The court observed (Pet. App. 6a) that "[t]he paramount nature of the priority created in the Federal Insolvency Statute was upheld in the context of insurance company liquidation" prior to the *South-Eastern Underwriters* decision. In 1936, this

---

[2] The McCarran-Ferguson Act provides, in part:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance * * *.

15 U.S.C. 1012.

Court held that the federal priority statute applied in a state proceeding to liquidate an insolvent insurance company despite a state statute providing that in-state creditors would be paid ahead of all other creditors. *United States* v. *Knott*, 298 U.S. 544 (1936). Similarly, the New York courts recognized, prior to *South-Eastern Underwriters*, that the federal priority statute applied in insurance company liquidation proceedings, and that "[t]he right of the United States government to preference cannot be defeated by any State statute, nor by any rule adopted by the State court." *In re Casualty Co. of America*, 196 A.D. 175, 176-177 (1st Dep't), aff'd, 232 N.Y. 559 (1921). In light of these decisions, the court concluded that "[i]t would be contrary to the clearly expressed intent of McCarran-Ferguson as well as in contravention of long-standing and controlling state and federal precedent, if this court were to accept [petitioner's] position and treat the IRS claim to taxes as that of [a] general creditor." Pet. App. 7a.

3. The Appellate Division affirmed without opinion. Pet. App. 1a-2a. Judge Asch concurred. He observed that the trial court's decision does not conflict with a New York case holding that the liquidation provisions of New York's insurance law are not impaired by the provisions of the Federal Arbitration Act, 9 U.S.C. 1 *et seq.* Judge Asch noted that "[i]n the instant matter, we deal with a different portion of the liquidation law and an entirely different federal statute." Pet. App. 1a.

The New York Court of Appeals denied petitioner's motion for leave to appeal. Pet. App. 8a.

ARGUMENT

The government has filed a petition for a writ of certiorari in *United States Dep't of the Treasury* v. *Fabe*, petition for cert. pending, No. 91-1513. The question presented in that case is "[w]hether a state statute

establishing the priority of creditors' claims in a proceeding to liquidate an insolvent insurance company is a law regulating 'the business of insurance' within the meaning of the McCarran-Ferguson Act." 91-1513 Pet. at I. In our petition for a writ of certiorari we note that the decision of the United States Court of Appeals for the Sixth Circuit in *Fabe* conflicts with the decisions of two other courts of appeals. See *id.* at 6 (citing *Idaho ex rel. Soward* v. *United States*, 858 F.2d 445 (9th Cir. 1988), cert. denied, 490 U.S. 1065 (1989); *Gordon* v. *United States Dep't of the Treasury*, 846 F.2d 272 (4th Cir.), cert. denied, 488 U.S. 954 (1988)). Our petition also notes that the Sixth Circuit's decision in *Fabe* conflicts with state court decisions, including the decision in this case. See 91-1513 Pet. at 6 (citing *In re Union Indemnity*, 551 N.Y.S.2d 446 (Sup. Ct. 1990), aff'd *sub nom. Curiale* v. *United States*, 566 N.Y.S.2d 853 (App. Div. 1991); *Langdeau* v. *United States*, 363 S.W.2d 327 (Tex. Civ. App. 1962)). Accordingly, we agree with petitioner that the decision of the Appellate Division of the New York Supreme Court in this case conflicts with the decision of the United States Court of Appeals for the Sixth Circuit in *Fabe*. We also agree that the question presented is important and is ripe for review by this Court.[3]

We believe, however, that *Fabe* is a better vehicle than this case for resolving the conflict in the lower courts. *Fabe*, unlike this case, created the type of conflict that ordinarily warrants review by this Court. In *Fabe*, the Sixth Circuit rendered a decision that is in conflict with the decisions of other courts of appeals. In this case, in

[3] The decision of the Appellate Division of the New York Supreme Court conclusively disposes of the petitioner's claim that the federal priority statute does not apply to the IRS's tax claims. Consequently, the judgment of the Appellate Division of the New York Supreme Court appears to be final within the meaning of 28 U.S.C. 1257. See *Clark* v. *Williard*, 292 U.S. 112, 117-119 (1934).

contrast, the New York Court of Appeals (New York's court of last resort) declined to hear petitioner's case. Because this case was not decided by a state court of last resort, it would not ordinarily warrant review by this Court. See Sup. Ct. R. 10.1 (a) and (b).

In addition, the Sixth Circuit's decision in *Fabe* offers the Court a more fully developed analysis of the question presented. Each of the three judges on the Sixth Circuit panel in *Fabe* wrote a separate opinion. Considered together, the three opinions in *Fabe* thoroughly discuss the question presented. The opinion of the New York trial court in this case is considerably less comprehensive. In particular, the New York court found it unnecessary even to consider whether a state priority statute regulates "the business of insurance," because the court concluded that the McCarran-Ferguson Act was not intended to alter prior judicial decisions holding that the federal priority statute applies in state proceedings to liquidate an insolvent insurance company.

Although the decision of the Appellate Division of the New York Supreme Court ordinarily would not warrant review by this Court, this case presents the same question as *Fabe*. If the Court grants the petition for a writ of certiorari in *Fabe*, the decision in that case will control the outcome of this case. Accordingly, the petition for a writ of certiorari in this case should be held pending the Court's disposition of *Fabe*.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of the petition for a writ of certiorari in *United States Dep't of the Treasury* v. *Fabe*, petition for cert. pending, No. 91-1513. If the Court denies the petition for a writ of certiorari in *Fabe*, the petition for a writ of certiorari in this case should be denied. If the Court grants the petition for a writ of

certiorari in *Fabe*, the petition for a writ of certiorari in this case should be held pending the Court's decision in *Fabe* and then disposed of as appropriate in light of that decision.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

WILLIAM KANTER
JENNIFER H. ZACKS
Attorneys

APRIL 1992